

Panel of Constitutional Experts – Recall Elections Inquiry

Supplementary Submission from Graeme Orr

Summary

My first submission expressed opposition to the concept of recall elections in Australia.

This short supplementary submission addresses the position of the Legislative Council and the question of campaign finance, in case the panel is favourable towards a recall process.

Legislative Council. The Legislative Council is part of 'the legislature' of New South Wales.¹ It is the oldest representative body in Australia, although it was only moved to directly/democratically elected status in 1978.

The source of the recent interest in recall elections was the unpopularity of the late, unlamented Labor administration. However it would be odd to think of the recall only in terms of recalling a 'government', in the sense of an executive with support in the Legislative Assembly. If government reaches such a nadir that a recall would be warranted, the causes could involve broken relations with the upper house,² or the upper house's behaviour. There is also the need, at least in modern understanding, to keep elections for the two houses in synch. (Indeed the newly minted election spending limits are predicated on a model of parties contesting a general election of both houses).

Any recall process leading to a fresh election would have to dissolve not just the Legislative Assembly, but truncate the terms of the whole Legislative Council, with half up for election.

My first submission concedes there is a theoretical case for an ability to recall individual MPs. This, indeed, is the US model. However that model does not map onto a system of proportional representation, such as that entrenched for the New South Wales Legislative Council. MLCs do not represent a defined constituency: they notionally serve the whole state, but through representing a cause or party grouping. It is not possible to have a recall election apply to individual MLCs and retain that representative system. The proportionality of the Legislative Council would be imperilled, and there would be an incentive for the most popular major party to initiate recalls against minor party or independent MLCs.

The alternative to a proper recall election for individual MLCs would be a recall process, but with electors only voting on the question of recall and the vacancy being filled by a count-back from the relevant general election. On its face this would look similar to provisions such as s 15 of the

¹ *Constitution Act 1902* (NSW) s 3.

² Beyond those problems which might be resolved by the 'deadlock' procedures in *Constitution Act 1902* s 5A (appropriation bills may be assented to without passage by the Legislative Council) and s 5B (particularly deadlocked bill/s may be submitted to referendum).

Australian Constitution, which deals with filling Senate vacancies. However it would be a travesty on at least three grounds: (1) a statewide vote to oust an MLC might be overkill; (2) the countback could date to six or seven years earlier; and (3) intra-party factionalism could come into play, so that a party might support a recall of their own MLC, just to replace him/her with someone who had been placed lower on the original ticket.

Campaign Finance

Finally, I note that any proposal for a recall process would need to address some complex campaign finance considerations, given the recently minted *Election Funding and Disclosures Amendment Act 2010* (NSW) and the bipartisan support for the principle of expenditure limits.

1. The 2010 Act is built on an assumption of a relatively fixed and predictable four year term. (Hence the capped expenditure period backdating to October prior to the ordinary March general election). Under the new scheme, any fresh election would be subject to a limited capped expenditure period,³ although a recall election is not really a snap or unexpected election but one preceded by significant campaigning.
2. The principle of limiting expenditure at elections ought therefore also apply to campaigns for a recall. However the cost structure of a recall campaign would be quite different to a regular election, particularly if the recall is envisaged as a kind of direct democracy: for instance the cost of gathering signatures to a petition and the desirable involvement of more 'third parties'. There is US research on such costs, and indeed evidence of an industry in the US through which such staples of direct democracy such as petition gathering can be 'contracted out'.

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³ *Election, Funding and Disclosure Act 1981* (NSW) s 95H - effectively the capped period would not be 6 months but just the formal election period, ie ~ 1 month.